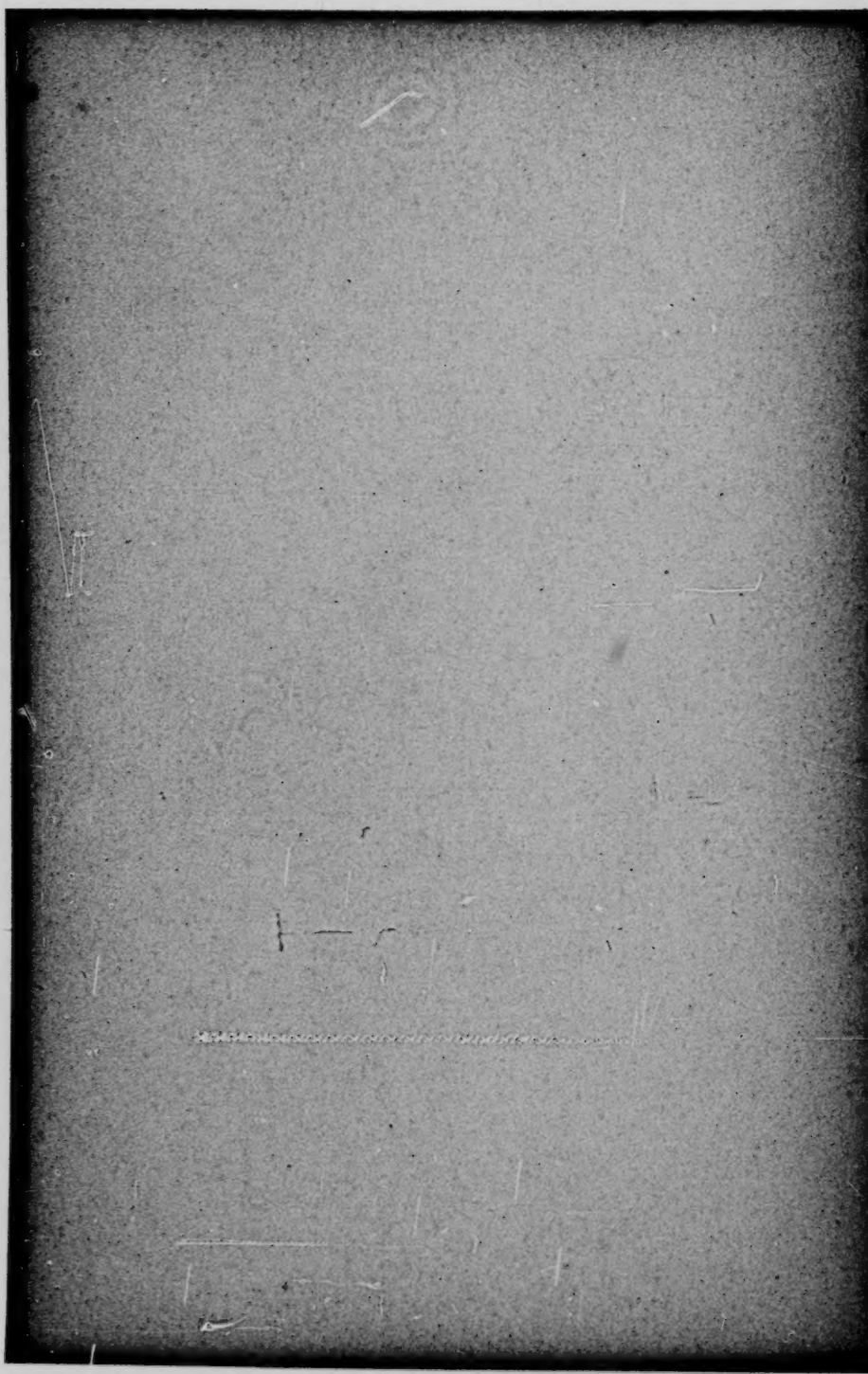

In The
Supreme Court of the United States

October Term, 197[illegible]

FRANCES A. [illegible],

Petitioner,

vs.

[illegible] PAPER CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENT

[illegible]

[illegible]

Statutes and Rules

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-415

FRANCIS A. RONDEAU,

Petitioner,

vs.

MOSINEE PAPER CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENT

STATEMENT OF THE CASE*

This case arose under certain amendments to the Securities Exchange Act of 1934 ("the Act"), known as the Wil-

* Only matters which respondent considers were inadequately or misleadingly treated in petitioners' statement of the case (Petition at 8-9) are presented in this statement.

liams Act (Act of July 29, 1968, Pub. L. No. 90-439, 82 Stat. 456, codified [in relevant part] at 15 U.S.C. §78m(d)).

Section 13(d) of the Williams Act, 15 U.S.C. §78m(d) was created ". . . to close a gap in the disclosure requirements of existing securities laws by requiring full disclosure by persons or groups who 'purchase by direct acquisition or by tender offers * * * substantial blocks of the securities of publicly held companies.'" *Bath Industries, Inc.* v. *Blot*, 427 F.2d 97, 102 (7th Cir. 1970). Specifically, "the purpose of section 13(d) is to require disclosure of information by persons who have acquired a substantial interest, or increased their interest in the equity securities of a company by a substantial amount, within a relatively short period of time." S.Rep. No. 550 at 7; H.R.Rep. No. 1711 at 8, U.S. Code Cong. & Admin. News p. 2818. "Otherwise, investors cannot assess the potential for changes in corporate control and adequately evaluate the company's worth." *GAF Corp.* v. *Milstein*, 453 F.2d 709, 717 (2nd Cir.), cert. den., 406 U.S. 910 (1972). *See generally* Comment, Section 13(d) and Disclosure of Corporate Equity Ownership, 119 U.Pa.L. Rev. 853 (1971).

Under section 13(d), a person acquiring beneficial ownership of more than 5% of the shares of an issuer must within ten days file with the SEC and mail to the issuer a Schedule 13D containing detailed information as to his identity, the identities of his associates in the acquisition, their backgrounds, holdings, financing and purposes in acquiring the stock.

Petitioner Francis A. Rondeau, described by his attorneys in the district court as a "successful and knowledge-

able businessman,'"* made his first purchase of respondent Mosinee Paper Corporation's common stock (500 shares) on April 5, 1971. By May 17, 1971** he had acquired 40,309 shares, some in his own name, some in the names of corporations and other entities controlled by him. That number of shares constituted more than 5% of Mosinee's common stock outstanding. Ten days later, on May 27, Rondeau was required by law to file with the Securities and Exchange Commission and mail to Mosinee the Schedule 13D. But he did not. Instead, for a period of 112 days, from May 27 to August 4, 1971, Rondeau, six corporations and the partnership which he controlled bought 16,384 more shares of Mosinee stock at relatively low prices from investors who might well have refused to sell the stock or demanded a higher price had they known of Rondeau's purpose to obtain or consider obtaining effective control of Mosinee (a purpose disclosed when he finally filed on August 25, 1971).

Mosinee commenced action in the district court on September 2, 1971, seeking (among other things) damages and permanent injunctive relief. There was fairly extensive

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* Brief in Support of Defendants' Motion for Summary Judgment, Appeal Doc. No. 15, p. 4.

** Petitioners misleadingly state that "[o]n July 9, 1971 respondent's stock register indicated that petitioner controlled more than 5% of its issued and outstanding stock." (Petition at 8). That is true. But the statute is not triggered by what happens on the "stock register"—it is triggered by an acquisition of more than 5%. That concededly happened on May 17, 1971.

discovery. On December 24, 1971, the defendants filed a motion for summary judgment, which Mosinee opposed. On February 13, 1973, Judge Doyle entered his Opinion and Order for entry of summary judgment in defendants' favor. P.A. 15. The Court of Appeals disagreed, holding that Rondeau's failure to file created precisely the kind of situation the Williams Act was designed to preclude:

> "By failing to timely file, Rondeau effectively failed to disclose to investors and management the circumstances surrounding his potential to effect the control of Mosinee Paper while at the same time he continued to purchase securities in a market that had not been adequately apprised of such potential. Under the circumstances, Rondeau's failure to timely file was more than a mere technical violation of the Williams Act." P. A. 31.

Petitioners contend: (1) that granting relief against a section 13(d) violation when no "deliberate, covert and conspiratorial conduct" has been shown placed the Seventh Circuit Court of Appeals in conflict with the Eighth; (2) that the Seventh Circuit's holding that Mosinee's being "irreparably injured" was not a prerequisite to injunctive relief "presents an important question which should be settled by the Court"; and (3) that the Court of Appeals' holding as to irreparable injury "probably" conflicts with the applicable case law of this Court.

For the reasons stated below, we respectfully submit that the petition lacks merit.

ARGUMENT

I.

THERE IS NO SPLIT OF AUTHORITY BETWEEN CIRCUITS ON THE QUESTION WHETHER "DELIBERATE, COVERT AND CONSPIRATORIAL CONDUCT" IS REQUISITE TO INJUNCTIVE RELIEF FOR VIOLATION OF THE FEDERAL SECURITIES LAWS.

A. The Per Curiam Order of the Eighth Circuit Which Petitioners Cite as Creating a Conflict Between Circuits Has No Precedential Value.

Astonishingly, petitioners' claim that there exists a conflict among circuits is premised upon a *per curiam* affirmance by the Court of Appeals for the Eighth Circuit which the Eighth Circuit itself specifically determined had "no precedential value,"* and which to Seventh Circuit Judge Pell (dissenting below) suggested only the "possibility" of a split of authority between circuits. P.A. 45. The *per curiam* order was entered in *Tri-State Motor Transit Co.* v. *National City Lines*, No. 73-867 (8th

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* Rule 14 of the Court of Appeals for the Eighth Circuit provides in relevant part:

"Rule 14. Affirmed or enforced without opinion. When the Court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the Court for decision: * * * (4) that no error of law appears; and the Court also determines that an opinion *would have no precedential value*, the judgment or order may be affirmed or enforced without opinion.

"In such case, the Court may in its discretion enter either of the following orders: '*Affirmed. See Rule 14,*' or 'Enforced. See Rule 14.'" (Emphasis supplied.)

The *per curiam* affirmance of the Eighth Circuit in *Tri-State* states: "Affirmed. *See* Rule 14 of the Rules of this Court." (A. 3).

Cir. April 4, 1974). Since the Eighth Circuit also directed that the order was "not to be printed or published" (A. 3), we have appended it to this brief for the convenience of this Court. As Judge Pell also noted, there is no factual development in the order (P.A. 45), the Eighth Circuit having observed: "It is axiomatic that the issuance of injunctive relief is committed to the trial court's discretion." (A. 3). A "possibility" of a split of authority created by a decision without precedential value does not warrant issuance of a writ of *certiorari*.

B. The Seventh Circuit's Decision Is Consistent With the Relevant and Considered Decisions of Other Courts of Appeal.

If as petitioners suggest relief may be granted for a section 13(d) violation only when there is "deliberate, covert and conspiratorial conduct," then the statutory purpose

> "to alert the market place to every large, rapid aggregation or accumulation of securities, *regardless of technique employed*, which *might* represent a *potential* shift in corporate control"*

is completely vitiated.

Courts of Appeals which have considered the question have held as did the Seventh Circuit in this case that the state of mind and motivation of the securities law violator is not determinative of whether or not injunctive relief can be granted.

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* *GAF Corp.* v. *Milstein*, 453 F.2d 709, 717 (2d Cir.), *cert. den.* 406 U.S. 910 (1972). (Emphasis supplied).

For example, in *SEC* v. *Great American Industries, Inc.*, 407 F.2d 453 (2d Cir.), *cert. den.* 395 U.S. 920 (1969) the SEC sought injunctive relief against the repetition of allegedly inadvertent errors in Great American's SEC form 8-K reports.* Judge Friendly said:

> "The statute places the duty of filing correct reports on the issuer; while inadvertence and prompt correction after complaint are mitigating circumstances and may affect liability for damages, they do not defeat the SEC's right to injunctive relief." 407 F.2d at 457.

In *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281 (2d Cir. 1973) the Second Circuit held that the standard of culpability in suits for damages for violation of the proxy rules** does not require establishment of "any evil motive or even reckless disregard of the facts." 478 F.2d at 1301. The court reasoned that whereas section 10(b) of

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* Form 8-K is used for current reports filed pursuant to Section 13 or 15(d) of the Act, SEC Rule 13a-11 and 15d-11, 17 C.F.R. §§ 240.13(a)-11 and 240.15(d)-11.

** Section 14(a) of the Act, 15 U.S.C. § 78n, makes it unlawful for any person to solicit any proxy "in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." The SEC promulgated Rule 14a-9(a), 17 C.F.R. § 240.14a-9(a), prohibiting solicitation by means of a proxy statement "containing any statement which, at the time and in light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication . . . which has become false or misleading."

the Act* "emphasizes the prohibition of fraudulent conduct on the part of insiders to a securities transaction . . . in section 14(a) Congress was somewhat more concerned with protection of the outsider whose proxy is being solicited," 478 F.2d at 1299—just as in section 13(d) Congress was more concerned with protecting outside investors who could not otherwise "assess the potential for changes in corporate control and adequately evaluate the company's worth." *GAF Corp.* v. *Milstein*, 453 F.2d 709, 717 (2d Cir. 1971).** The Second Circuit also pointed out in distinguishing section 10(b) cases from section 14(a) cases that the former often relate to statements with re-

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* 15 U.S.C. §78j(b), pursuant to which the SEC adopted Rule 10b-5, 17 C.F.R. §240.10b-5, which broadly proscribes fraud in connection with the purchase or sale of a security. In the Second Circuit liability for violation of Rule 10b-5 requires proof of "scienter" —that is, "willful or reckless disregard for the truth." *Lanza* v. *Drexel & Co.*, 479 F.2d 1277, 1306 (2d Cir. 1973). *Contra, Ellis* v. *Carter*, 291 F.2d 270, 274 (9th Cir. 1961); *Royal Air Properties, Inc.* v. *Smith*, 312 F.2d 210, 212 (9th Cir. 1962); *Stevens* v. *Vowell*, 343 F.2d 374, 379-380 (10th Cir. 1965); *Myzel* v. *Fields*, 386 F.2d 718, 734-735 (8th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968); *City National Bank* v. *Vanderboom*, 422 F.2d 221, 229-230 (8th Cir.), *cert. denied*, 399 U.S. 905 (1970). Cf. *SEC* v. *Van Horn*, 371 F.2d 181, 185 (7th Cir. 1966).

** Indeed, the Williams Act was enacted as a companion to section 14(a):

> "Although individuals seeking control through a proxy contest were required to comply with section 14(a) of the Securities Exchange Act and the proxy rules promulgated by the SEC, and those making stock tender offers were required to comply with the applicable provisions of the Securities Act, before the enactment of the Williams Act there were no provisions regulating cash tender offers or other techniques of securing corporate control." *GAF Corp.* v. *Milstein*, 453 F.2d at 717.

spect to important business and financial developments, issued by corporations without legal obligation to do so, and that imposition of too liberal a standard of culpability would deter this desirable activity. This consideration does not exist where, under section 14(a) as under section 13(d), the filing is required. 478 F.2d at 1300.

Petitioners cite *SEC* v. *Culpepper,* 270 F.2d 241 (2d Cir. 1959), *SEC* v. *Universal Service Association,* 106 F.2d 232 (7th Cir. 1939) and *U.S.* v. *W. T. Grant Co.,* 345 U.S. 629 (1935) for the proposition that "even the Securities and Exchange Commission . . . is not entitled to injunctive relief unless it proves that there is a reasonable expectation of future violations" (Petition at 10). The continued viability of this test is open to question. See *SEC* v. *Great American Industries, Inc.,* 407 F.2d 453 (2d Cir.), *cert. denied* 395 U.S. 920 (1969). Moreover, this Court said in *U.S.* v. *W. T. Grant Co., supra*:

> "The chancellor's decision is based on all the circumstances; his discretion is necessarily broad and a strong showing of abuse must be made to reverse it. To be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations." 345 U.S. at 633.

The Seventh Circuit had before it an extensive record of deposition testimony and molded its decree to the necessities of the particular case, as required by *Hecht Co.* v. *Bowles,* 321 U.S. 321, 329-30 (1944), letting the "punishment fit the crime" as suggested in the context of the federal securities laws by the Second Circuit in *Electronic Specialty Co.* v. *International Controls Corp.,* 409 F.2d 937, 947 (2d Cir. 1969). "It is for the federal courts 'to adjust their remedies so as to grant the necessary relief' where federally secured rights are invaded." *J. I. Case Co.* v. *Borak,* 377 U.S. 427, 433 (1964).

In any event, the cases cited by petitioners deal only with the question when it is appropriate expressly to enjoin future violations. They are wholly inapposite to the Court of Appeals' direction that the district court should enter a remedial decree prohibiting voting of those shares purchased in violation of the Act for a period of five years "to neutralize Rondeau's violation of the Act and to deny him the benefit of his wrongdoing" (P.A. 33), as was done in *Chris-Craft Industries, Inc.* v. *Bangor Punta Corp.*, 480 F.2d 341 (2d Cir.), *cert. den.* 414 U.S. 979 (1973).

II.

IRREPARABLE INJURY TO THE PRIVATE PARTY SEEKING INJUNCTIVE RELIEF IS NOT ESSENTIAL WHERE THAT PARTY IS ACTING TO VINDICATE THE PUBLIC INTEREST IN ENFORCEMENT OF A FEDERAL REGULATORY SCHEME.

Petitioners suggest that a "cornerstone of equitable law" was "overturned" and that conflict with applicable decisions of this Court was created by the Court of Appeals' holding that Mosinee, the corporate entity, need not suffer "irreparable injury" as a prerequisite to injunctive relief. Petitioners ignore the context in which this case arose. Mosinee's action was to enjoin violation of a federal securities law enacted by Congress to protect the investor's interest in disclosure of facts essential to informed investment decision-making. This Court has held:

> " 'Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to do when only private interests are involved.' " *U.S.* v. *First National City Bank,* 379 U.S. 378, 383

(1965), quoting *Virginian D. Co.* v. *Federation,* 300 U.S. 515, 552 (1937).

In vindication of the "paramount public interest" in enforcement of the federal securities laws,* the Courts of Appeals have observed this principle by analytically balancing the interests involved instead of restricting inquiry to the particular interest of the party seeking the injunction:

> "Finally, in balancing the equities, the public interest must be considered. If G&W is in fact proceeding in violation of the antitrust and securities laws, a preliminary injunction would serve the public interest as much as A&P's private interests. In this regard, by asserting these claims, A&P is assuming a dual role, including that of a private attorney general. Since it is impossible as a practical matter for the government to seek out and prosecute every important violation of laws designed to protect the public in the aggregate, private actions brought by members of the public in their capacities as investors or competitors, which incidentally benefit the general public interest, perform a vital public service. As the Supreme Court said in *J. I. Case Co.* v. *Borak,* 377 U.S. 426, 432 (1964), private actions provide 'a necessary supplement' to actions by the government and 'the possibility of civil damages or injunctive relief serves as a most effective weapon in the enforcement' of laws designed to protect the public interest."

Gulf & Western Industries, Inc. v. *Great A. & P. Tea Co., Inc.,* 476 F.2d 687, 698-99 (2d Cir. 1973), cited with approval in a Williams Act case by the Third Circuit in *Ronson Corp.* v. *Liquifin Aktiengesellschaft,* 483 F.2d 846, 849 (3d Cir.

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* *U. S.* v. *Griesa,* 481 F.2d 276, 286 (2d Cir. 1973).

1973). The point was made again in *Chris-Craft Industries, Inc.* v. *Piper Aircraft Corp.*, 480 F.2d 341, 386-87 (2d Cir.), *cert. den.* 414 U.S. 910, 924 (1973). See *Minnesota Mining and Mfg. Co.* v. *Meter*, 385 F.2d 265, 272 (8th Cir. 1967).

The Court of Appeals in this case took just such a balancing approach in finding "harm" to the public which resulted from Rondeau's failure to meet Williams Act filing requirements and which will result if violations of such requirements, however well-intentioned, are disregarded by the courts.

In none of the cases cited at page 12 of the Petition for the proposition that "irreparable injury has traditionally been a prerequisite to granting an injunction on a private cause of action" was the party seeking injunctive relief "assuming a dual role, including that of a private attorney general." *Gulf & Western Industries, Inc.* v. *Great A. & P. Tea Co., Inc., supra*, 476 F.2d at 699. In *Pa.* v. *Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1851), Pennsylvania sought to abate as a nuisance a bridge across the Ohio River that stopped some traffic on the river thereby reducing the state's revenue from the operation of connecting canals and railroad lines; in *Beacon Theaters* v. *Westover*, 359 U.S. 500 (1959), the plaintiff wanted to end the threat of impending antitrust lawsuits; in *Cameron* v. *Johnson*, 390 U.S. 611 (1968), the plaintiffs were asserting personal constitutional rights; and in *Locomotive Engineers* v. *M.-K.-T. R. Co.*, 363 U.S. 528 (1960), the union sought to maintain the wages of its members affected by a disputed work-force reduction pending the decision of the National Railroad Adjustment Board. In each of these cases the remedy sought would benefit only the party seeking it.

CONCLUSION

Respondent submits that this case does not meet the standards set by this Court for issuance of a writ of *certiorari*. There are no special and important reasons for review of the Seventh Circuit decision. There has been no viable demonstration that the Seventh Circuit failed to apply established legal principles to the facts of this case. The conflict between circuits suggested by petitioners is an illusion. For the foregoing reasons, respondent respectfully submits that the petition for writ of *certiorari* should be denied.

Respectfully submitted,

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November 11, 1974

APPENDIX

APPENDIX

It is axiomatic that the issuance of injunctive relief is committed to the trial court's discretion. We find no abuse of discretion in Judge Oliver's refusing an injunction and granting summary judgment for defendants under count I. We also agree with Judge Oliver's construction of the statute in count II.

Affirmed. *See* Rule 14 of the Rules of this Court.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

[Not to be printed or published.]